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Supreme Court, U.S.
FILED

No. 961860 MAR 3 1997

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In The

UNITED STATES SUPREME COURT

October Term 1996

HOMER HANRAHAN,

Petitioner,

v.

JAMES K. WILLIAMS, et al.,

Respondents.

Petition for a Writ of Certiorari
To the Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

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70pp

QUESTIONS PRESENTED

1. Whether, after the decision in Sandin v. Connor, ___ U.S. ___, 115 S. Ct. 2293 (1995), the wording of a parole statute should be the touchstone for determining if the statute confers a Due Process interest in parole when there is a direct conflict between the decision of the state supreme court and the federal court of appeals concerning whether the wording of the statute confers such an interest under the analysis called for by Greenholtz v. Nebraska Penal Inmates, 442 U.S. 2 (1979).

2. Whether a state supreme court has the authority to disregard the decision of a federal appeals court holding that a state statute creates a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment.

3. Whether the refusal of the Illinois Supreme Court to follow a 14-year old judgment of the Seventh Circuit Court of Appeals to the effect that a state statute creates a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment violates the "judicial" Ex Post Facto Clause of the Federal Constitution.

4. Whether a 14-year-old judgment of the Seventh Circuit Court of Appeals and long settled practice of a state parole board that parole is only denied where enumerated statutory criteria are unsatisfied creates a Due Process interest in parole in a case where those criteria are satisfied.

THE PARTIES

Petitioner

Homer E. Hanrahan

Respondents

James K. Williams
Joseph T. Dakin
Joanne S. Shea
Joseph J. Longo
Rafael Nieves
William Harris
Barbara Hubbard
Tommy Wells
Herbert D. Brown
Corrine Franklin
Anne E. Taylor
William Redmond
Illinois Prisoner Review Board

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PROCEEDINGS BELOW

The order of the Illinois Supreme Court denying petitioner's request for a rehearing is reprinted as Appendix A. The original opinion of the Illinois Supreme Court is reported at 174 Ill. 2d 268, 673 N.E.2d 251 (1996) and is reprinted as Appendix B. The petition for rehearing, which addresses questions the Illinois Supreme Court decided sua sponte in its decision, is reprinted as Appendix C.

JURISDICTION

The Illinois Supreme Court issued its judgment and opinion declining to follow the judgment of the Seventh Circuit Court of Appeals on September 19, 1996. It denied Mr. Hanrahan's request for rehearing on December 2, 1996. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 to review the judgment of the Illinois Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> " ... No State shall deprive any person of life, liberty, or property without just process of law ..."

United States Constitution, Amendment XIV, Section 1.

The Ex Post Facto Clause of Article I of the United States Constitution provides:

> "No State shall ... pass any ... ex post facto law ..."

United States Constitution, Article I, Section 10, §1.

The hearing and determination provision of the Illinois Parole Statute provides:

> (c) The Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is substantial risk that he will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline.

730 ILCS 5/3-3-5.

The Illinois regulations regarding the parole release decision provide:

> The Board shall not parole a person eligible for parole, if it determines that:

1) There is substantial risk that he will not conform to reasonable conditions of parole; or

2) His release at that time would depreciate the seriousness of his offense or promote disrespect for the law; or

3) His release would have a substantially adverse effect on institutional discipline.

20 Ill. Admin. Code § 1610.50

STATEMENT OF THE CASE

Petitioner Homer E. Hanrahan, an inmate at Dixon Correctional Center, Illinois, was arrested in 1974 on charges of murder, aggravated kidnaping, aggravated battery and conspiracy. In 1976, he was convicted on all counts and sentenced to an indeterminate sentence of 50 to 100 years.

At his parole hearing held on June 1 and June 28, 1993, Mr. Hanrahan introduced evidence that he satisfied each of the three criteria for parole set forth in the Illinois Uniform Code of Corrections, 730 ILCS 5/3-3-5(c) and the regulations of the Prisoner Review Board ("Board" or "PRB"), 20 Ill. Admin. Code § 1610.50.

First, he demonstrated that his release would not deprecate the seriousness of the offense. 730 ILCS 5/3-3-5(c)(2); 20 Ill. Admin. Code § 1610.50(a)(2). The sentencing judge, the Hon. Robert J. Collins, submitted an affidavit to the

PRB in support of Mr. Hanrahan's release, stating that when he imposed the original sentence, he expected that Mr. Hanrahan would be released on parole after 11 to 12 years, depending on his prison record. Additionally, Mr. Hanrahan introduced evidence that his period of incarceration -- 17 years at the time of the June 1993 parole hearing -- was longer than the average time served for murder by persons released from the Illinois Department of Corrections in each year since 1978, the first year for which such statistical information is available.

Second, Mr. Hanrahan showed that his release would not have an adverse effect on institutional discipline -- the factor that requires the PRB to assess Mr. Hanrahan's institutional performance. 730 ILCS 5/3-3-5(c)(3); 20 Ill. Admin. Code § 1610.50(a)(3). It was undisputed that Mr. Hanrahan had a perfect disciplinary record during the 17 years of his incarceration.

Third, Mr. Hanrahan demonstrated the absence of a substantial risk that he would be unable to conform with reasonable conditions of parole. 730 ILCS 5/3-3-5(c)(1); 20 Ill. Admin. Code § 1610.50(a)(1). Mr. Hanrahan had no prior convictions, no history of drug dependence or affiliation with gangs or organized crime. The undisputed evidence was that Mr. Hanrahan had behaved in an exemplary fashion in the ten months in 1991 that he was free on bond pending the State's appeal of the decision of the United States District Court for the Northern District of Illinois granting his petition for a writ of habeas corpus. United States ex rel. Hanrahan v. Thieret, 748 F. Supp. 603 (N.D. Ill. 1990). During these ten months, Mr. Hanrahan complied with each and every condition of his

release, obtained employment, established friendships in the community where he lived and led a crime-free life. When the Seventh Circuit Court of Appeals reversed the district court's decision, United States ex rel. Hanrahan v. Thieret, 933 F.2d 1328 (7th Cir. 1991), Mr. Hanrahan surrendered without incident to the prison authorities.

On June 30, 1993, the Board denied parole to Mr. Hanrahan. In spite of Judge Collins' affidavit, Mr. Hanrahan's exemplary disciplinary record and his demonstrated ability to function normally and productively in free society, the Board's decision stated that granting parole to Mr. Hanrahan would deprecate the serious nature of the crime and promote a disrespect for the law.

Mr. Hanrahan subsequently filed an action seeking mandamus relief and requesting administrative review of the Board's decision based on a common law writ of certiorari. The Circuit Court of Cook County dismissed the count of his complaint that requested a common law writ of certiorari as insufficient in law. Mr. Hanrahan appealed to the Illinois Appellate Court for the Second Judicial District, which reversed the Circuit Court's decision. Hanrahan v. Williams, 267 Ill. App. 3d 735, 643 N.E.2d 262 (2d Dist. 1994).

Respondents were granted leave to appeal to the Illinois Supreme Court. The only issue before the court, as reflected in the briefs filed and oral arguments made by both parties, was whether State courts may review a decision of the PRB pursuant to a common law writ of certiorari. Reversing the appeals court, the Illinois Supreme Court held that a common law writ of certiorari is not available to challenge a decision of

the PRB.

On its own initiative, the Illinois Supreme Court went on to declare that it was not bound by the decision of the Seventh Circuit in United States ex rel. Scott v. Illinois Parole and Pardon Board, 669 F.2d 1185 (7th Cir.), cert. denied, 459 U.S. 1048 (1982). In Scott, the Seventh Circuit, relying upon this Court's holding in Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), held that the Illinois parole statute establishes a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment. Scott, 669 F.2d at 1187-90. Although the issue was neither briefed nor argued by the parties, the Illinois Supreme Court purported to overrule Scott and to hold to the contrary that the Illinois parole statute does not create a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Hanrahan, 174 Ill.2d at 277, 673 N.E.2d at 255-56. In reaching its decision, the Illinois Court did not provide Mr. Hanrahan with an opportunity to argue that Scott was correctly decided and/or binding on the Illinois Supreme Court. Nor did the Court articulate any explanation for declining to follow Scott, beyond a statement that it disagreed with the decision and an assertion that it was not bound to follow it.[1] Petitioner filed a petition for rehearing urging the Illinois Supreme Court to reconsider its decision not to follow Scott (App. C). The Illinois

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[1] The Illinois court's discussion of Greenholtz in the paragraph following its refusal to follow Scott concerns the second limb of the due process enquiry, i.e., what process is due. Id. at 278, 673 N.E.2d at 256. It does not concern the first stage of the inquiry - whether a statute creates a liberty interest protected by the Due Process Clause, the precise issue on which the court disagreed with Scott.

Supreme Court denied the petition without explanation (App. A).

There are four reasons why Mr. Hanrahan's petition for a writ of certiorari should be granted. First, the interpretation of Greenholtz provided by the Illinois Supreme Court in this case directly conflicts with the interpretation given the same case by the Seventh Circuit in Scott. In Greenholtz, this Court held that the Nebraska parole statute creates a liberty interest in parole because its language issued a clear command to the Nebraska Parole Board to release eligible prisoners if they satisfied the statutorily mandated criteria. Greenholtz, 442 U.S. at 12. Analyzing the Illinois parole statute in light of Greenholtz, the Seventh Circuit in Scott observed that it was the "mirror image" of the Nebraska statute and accordingly, that Greenholtz compelled the conclusion that it creates a liberty interest in parole. Scott, 699 F.2d at 1188.

The Supreme Court of Illinois reached the opposite conclusion without analyzing the test that this Court set out in Greenholtz for determining whether a parole statute creates a liberty interest. Hanrahan, 174 Ill. 2d at 277, 673 N.E.2d at 256. This Court should resolve the conflict between the Illinois Supreme Court and the Seventh Circuit as to the meaning and application of Greenholtz. The case also presents the Court with the opportunity to re-evaluate Greenholtz in light of its recent decision in Sandin v. Connor, ___ U.S. ___, 115 S. Ct. 2993 (1995), concerning the appropriate test for determining whether state law creates liberty interests.

Second, this case presents a direct conflict between the

Illinois Supreme Court and the Seventh Circuit on the issue of whether the Illinois parole statute creates a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment. The Court has not decided if federal or State courts have the authority to determine definitively whether state law creates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

Third, the decision of the Illinois Supreme Court conflicts with decisions of the federal courts of appeal holding that the Ex Post Facto Clause prohibits the retrospective application of new standards for determining parole that are more onerous than those in effect at the time the potential parolee committed the offense. Although the Illinois Supreme Court did not expressly address the issue, its holding that the Illinois parole statute does not create a liberty interest in parole means that the PRB is no longer obliged to release Mr. Hanrahan if he satisfies the statutorily mandated criteria. Instead, the PRB can deny parole for any reason or for no reason at all. This holding directly conflicts with decisions of federal courts of appeals holding that a retrospective and substantial alteration in the conditions governing parole release decisions violates the Ex Post Facto Clause.

Fourth, contrary to the settled law of this Court, the decision of the Illinois Supreme Court interferes with the expectation interest protected by the Due Process Clause that arose from the settled practice of the PRB. On each occasion that PRB considered Mr. Hanrahan's parole eligibility, the Board measured his eligibility in accordance with the substantive criteria set out in the Illinois parole statute, as Scott dictated that it should. Mr. Hanrahan is unaware of a

single instance in which the PRB denied parole to any prisoner on a ground other than the failure to satisfy the statutorily mandated substantive criteria. In at least one case, the PRB agreed that Scott was correctly decided. In addition, federal and Illinois state courts have repeatedly adhered to the holding in Scott. Prior to the decision under review, the Illinois Supreme Court has had the opportunity to question the holding in Scott but instead proceeded on the assumption that it was correctly decided.

REASONS FOR GRANTING THE WRIT

I. THE ILLINOIS SUPREME COURT AND THE SEVENTH CIRCUIT CONFLICT AS TO THE PRECISE MEANING AND APPLICATION OF THIS COURT'S DECISION IN GREENHOLTZ V. NEBRASKA PENAL INMATES, 442 U.S. 1 (1979)

The Illinois Supreme Court in this case and the Seventh Circuit in Scott reached diametrically opposite results in interpreting and applying this Court's decision in Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979). The resulting conflict merits this Court's attention because it casts on doubt the precise meaning and application of its holding in Greenholtz.

In Greenholtz, this Court held that the Nebraska parole statute created a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment. Central to the Court's decision was the mandatory character of the Nebraska parole statute. In particular, the requirement that the Parole Board "shall" order the prisoner's release "unless" one of the four grounds for deferral set out in the statute existed, convinced the Court that the statute created a liberty interest in parole. Id. at 12.

The Seventh Circuit in Scott relied heavily on Greenholtz in reaching its decision that the Illinois equivalent of the Nebraska statute created a liberty interest in parole. Scott, 669 F.2d at 1187-88. After examining Greenholtz and

comparing the relevant provisions of the Illinois and Nebraska statutes, the Seventh Circuit observed that the Illinois statute was the "mirror image" of the Nebraska statute. Id. at 1188. The Court could see no difference between the statutory admonition in the Illinois statute that the Board "shall not" release a prisoner "if" one of the three statutory criteria were found to exist and the requirement in the Nebraska statute that the Board "shall" release a prisoner "unless" one of the four statutory criteria were found to exist:

> "Instead of directing the Board to release an eligible inmate unless one of the conditions is found, Illinois has simply stated the rule in the negative - the Board shall not release the inmate if one of the conditions is found. Even the specified conditions under which release is to be deferred are the same, except for the fact that the Nebraska statute includes an additional reason for deferral which Illinois' does not."

Id.

Because there was no practical difference between the two statutes, the court concluded that the Illinois statute, like the Nebraska statute, created a liberty interest in parole.

Fourteen years later in this case, the Illinois Supreme Court reached the opposite conclusion. The Court did not apply to the Illinois statute, as did the Seventh Circuit in Scott, the test that this Court set out in Greenholtz for determining whether a state statute creates a liberty interest in parole. Nor did the court compare the Illinois and Nebraska statutes, again

as the court did in Scott, to determine whether there is a distinction between the two sufficient to justify a departure from this Court's holding in Greenholtz. The court simply expressed disagreement with the holding of the Seventh Circuit in Scott and declared that it was not bound by the decision. Hanrahan, 174 Ill. 2d at 277, 673 N.E.2d at 256.

Resolution by the Court of the conflicting interpretations of Greenholtz provided by the Illinois Supreme Court and the Seventh Circuit will have salutary effects that extend beyond the question presented in the instant case. It will also provide the Court with an opportunity to decide whether, and in what circumstances, state law creates liberty interests other than parole.

In recent years, the Court has begun to question the wisdom of analyzing the provisions of State statutes and regulations to determine whether State law creates liberty interests protected by the Due Process Clause. In Board of Pardons v. Allen, 482 U.S. 369 (1987), Justice Brennan, speaking for the majority, observed that he and three other Members of the Court shared the view that "the existence of a liberty interest in parole release is not solely a function of the wording of the governing statute." Allen, 482 U.S. at 373 n.3. More recently, this Court has signaled a retreat from analysis of the details of a state statute to examination of the nature of the deprivation. In Sandin v. Conner, ___ U.S.___, 115 S. Ct. 2293 (1995), the Court expressed dissatisfaction with the methodology employed in Greenholtz and its progeny for determining whether a statute creates a liberty interest. The Court criticized the microscopic analysis to which the Court had subjected state statutes:

> "In a series of cases since Hewitt [v. Helms, 459 U.S. 460 (1983)], the Court has wrestled with the language of intricate, often rather routine prison guidelines to determine whether mandatory language and substantive predicates created an enforceable expectation that the state would produce a particular outcome with respect to the prisoner's conditions of confinement."

Id. at 2298.

According to the Court, the methodology used in Hewitt and other cases impermissibly shifted the focus of the liberty interest inquiry from the nature of the deprivation to one based on the language of a particular statute or regulation. Auguring a return to the line of analysis the Court had employed in Wolff v. McDonnell, 418 U.S. 539 (1974), apotheosized in Meachum v. Fano, 427 U.S. 215 (1976), the Court observed that the method for identifying state-created rights protected by the Due Process Clause looks to the extent to which the deprivation is "atypical" as compared to the ordinary incidents of a prisoner's incarceration. Sandin, 115 S. Ct. at 2300.[2]

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[2] It should be noted that the four dissenting justices in Sandin would also look beyond the four corners of a state statute to determine whether a prisoner enjoys a liberty interest. Justice Ginsburg, joined by Justice Stevens, opined that a prisoner's due process rights should derive from the Fourteenth Amendment rather than from the prison code. Id. at 2303. Otherwise, a state could escape constitutional accountability by the simple

Justice Brennan's statement in Allen that the existence of a liberty interest in parole release is not solely a function of the words of a governing statute combined with this Court's admonition in Sandin that the nature of the deprived right rather than the wording of a State statute or regulation determines whether due process concerns are implicated, indicate that the provisions of state law are no longer controlling. To the extent that state courts are in a better position to interpret state statutes with a view to determining whether state regulations contain "language of an unmistakably mandatory character," so that limitation of an inmate's interests could not occur "absent specified substantive predicates," Hewitt, 459 U.S. at 471-72, this guidance is no longer necessary because Sandin counsels against an inquiry into the structure and language of state regulations. Instead, the touchstone of the due process inquiry is the nature of the alleged deprivation.

The conflicting interpretations that the Illinois Supreme Court and the Seventh Circuit have given to the Illinois parole statute casts doubt on the meaning and application of the liberty interest analysis that this Court explicated in Greenholtz. This case provides the Court with an opportunity to resolve the conflict and to elaborate upon and develop the

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expedient of conferring unfettered discretion on prison officials. Id. Although disclaiming any desire to abandon entirely an examination of state law, Justice Breyer, with whom Justice Souter joined, stressed that the inquiry should focus on whether the interest asserted is significant or not. Id. at 2308-09. Thus, all nine members of the present Court are agreed that the wording of state law does not determine whether state law creates a liberty interest.

re-examination of constitutionally protected liberty interests that it began in Sandin.

II. THE DECISION OF THE ILLINOIS SUPREME COURT DIRECTLY CONFLICTS WITH THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN SCOTT

This case presents a direct conflict between the decision of the highest court of a state and the decision of a federal court of appeals. The Illinois Supreme Court held that the Illinois parole statute does not create a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment. This holding directly conflicts with the Seventh Circuit's decision in Scott. Resolution of this conflict requires the Court to decide if state or federal courts have the authority to determine definitively whether state law creates a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment.

The Court left open this precise question in Greenholtz. In deciding that the Nebraska statute at issue created a liberty interest in parole, the Court observed that it did not have the "benefit" of a decision of the Nebraska Supreme Court. Greenholtz, 442 U.S. at 12. Nowhere did the Court suggest that it would be bound to follow a decision of the Nebraska Supreme Court on the issue.[3] Subsequently, in Board of

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[3] Noting the absence of a decision of the Nebraska Supreme Court, the Court in Greenholtz referred to Bishop v. Wood, 426 U.S. 341 (1976). Greenholtz, 442 U.S. at 12. There, the Court followed the interpretation of a city ordinance given by the federal district court and federal court of

Pardons v. Allen, 482 U.S. 369, 377 n.8 (1987), the Court noted that the Montana Supreme Court had not decided whether the Montana parole statute created a liberty interest in parole. The Court did not indicate what weight, if any, it would give to a decision of the Montana Supreme Court on the issue.

This Court has not specified if federal or State courts have the final word on whether state law creates liberty interests apart from parole. In Olim v. Wakinekona, 461 U.S. 238, 249 (1983), for example, this Court held that Hawaii State regulations governing the interstate transfer of prisoners did not create a liberty interest entitled to protection under the Due Process Clause. The Court mentioned in passing a decision of the Hawaii Supreme Court to the same effect but expressed no obligation to follow it, relying instead on its own precedents to reach the same conclusion. The dissenting Justices would have ignored the opinion of the Hawaii Supreme Court altogether because, in their view, the Court's prior jurisprudence dictated a contrary result. Id. at 259 n.13 (Marshall, J., with whom Brennan and Stevens, J.J., joined, dissenting).

In the area of property interests, however, this Court

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appeals. The Court noted that it lacked an "authoritative" definition of the ordinance in question by a South Carolina state judge. Bishop v. Wood, 426 U.S. at 345. It is important to note that the interpretation in question concerned a question of pure state law, i.e., whether the petitioner was an at-will employee of the city. Here, by contrast, the issue is whether a state statute creates a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment.

has not hesitated to reverse decisions of the highest court of a state that improperly deny that state statutes create interests protected by the Due Process Clause. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), for example, the Court reversed the Illinois Supreme Court's interpretation of an Illinois statute without according it any deference. The petitioner in that case had brought an action under the Illinois Fair Employment Practices Act, Ill. Rev. Stat., ch. 48 ¶ 851, et seq., claiming employment discrimination on the basis of physical handicap unrelated to ability. To obtain relief, a complainant had to bring a charge of unlawful conduct before the Illinois Fair Employment Practices Commission within 180 days of the occurrence of the alleged discrimination. The statute then gave the Commission 120 days within which to convene a factfinding conference to investigate the allegations. Appellant filed a timely charge of discrimination with the Commission. Apparently through inadvertence, the Commission scheduled the factfinding conference for a date five days after the expiration of the 120-day statutory period.

The Illinois Supreme Court held that the failure to schedule a conference within the prescribed statutory limit deprived the Commission of jurisdiction. It rejected appellant's argument that his federal due process and equal protection rights would be violated were the Commission's error allowed to extinguish his cause of action.

Reversing, this Court held that the statute created a species of property right protected by the Due Process Clause of the Fourteenth Amendment. Logan, 455 U.S. at 428-29. The Court observed that procedural provisions of state statutes do not govern whether an individual has a protected property

interest. According to the Court, the effect of the decision of the Illinois Supreme Court "would allow the State to destroy at will virtually any state-created property interest." Id. at 432.[4]

This case presents the Court with the opportunity to resolve the direct conflict between the decision of the Illinois Supreme Court in this case and the decision of the Seventh Circuit in Scott. It will enable the Court to decide if state or federal courts have the authority to determine definitively whether state law creates liberty interests protected by the Due Process Clause of the Fourteenth Amendment.

III. THE DECISION OF THE ILLINOIS SUPREME COURT CONFLICTS WITH THE HOLDINGS OF THE FEDERAL COURTS OF APPEALS THAT RETROSPECTIVE APPLICATION OF STRICTER CONDITIONS FOR OBTAINING PAROLE VIOLATE PRINCIPLES UNDERLYING THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION

Three elements must be present for a judicial

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[4] Relying on Logan, at least one federal court of appeals has expressed reservations about assigning to the state courts the final word on whether a state parole statute confers a due process liberty interest. See Ellard v. Alabama Board of Pardons and Paroles, 824 F.2d 937, 944 n.7 (11th Cir. 1987). The court noted that "a state court's interpretation of a statute might be so inconsistent with the statute's language and history that the state court decision itself would be a "wholly arbitrary and irrational" action in violation of due process. Id.

construction to be ex post facto.[5] First, the judicial construction "must be retrospective, that is, it must apply to events occurring before its enactment." Weaver v. Graham, 450 U.S. 24, 29 (1981). When Mr. Hanrahan committed the offenses in 1974, it was the prevailing view that when a state holds out the possibility of parole and makes it an integral part of its penological system, "due process includes as a minimum requirement that reasons be given for the denial of parole

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[5] The Court has recognized that the ex post facto protection against arbitrary and unpredictable state acts is so fundamental to our ordered system of liberty that it must be applied to restrain retroactive government action even when ex post facto legislation is not in issue. Accordingly the Court has expressly relied on its Ex Post Facto Clause jurisprudence to hold that when a government unforeseeably expands the law by judicial interpretation and then uses that new interpretation to deprive an accused of liberty, the government violates fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. In Bouie v. Columbia, 378 U.S. 347 (1964), the Court applied the very same principles that undergird the Ex Post Facto Clause to retroactive judicial applications of the law. The Court wrote:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law such as Art. I, §10, of the Constitution forbids ... If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

Id. at 353-54 (footnote omitted). See also, Landgraf v. USI Film Products, 511 U.S. 244 (1994)(Scalia, J., concurring)(discussing the unity of purpose of the Ex Post Facto and Due Process Clauses as reflected in the general legal policy against retroactivity).

release." See United States, ex rel. Richerson v. Wolff, 525 F.2d 797, 800 (7th Cir. 1975), cert. denied, 425 U.S. 914 (1976). Scott reexamined Richerson in response to this Court's holding in Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979). The Seventh Circuit concluded that the Illinois statute was virtually the "mirror image" of the statute that this Court had construed in Greenholtz and therefore created a liberty interest in parole. Scott, 669 F.2d at 1188.

Second, the judicial pronouncement must be unforeseeable in the sense that it represents a clear break in the law. United States v. Burnom, 27 F.3d 283, 284 (7th Cir. 1994). The decision of the Illinois Supreme Court clearly satisfies this criterion. As discussed in greater detail in Section IV of this petition, the PRB had applied due process to its parole decisionmaking practices since the time that Mr. Hanrahan committed his offenses. The Illinois courts and federal courts consistently applied Scott and on the one occasion that the Illinois Supreme Court had the opportunity to question the wisdom of the decision, it instead elected to proceed on the assumption that it was correctly decided. The clear break in the law that the decision represents is underlined by the fact that the respondents did not choose in their briefs or oral argument to ask the Illinois Supreme Court to reconsider the Seventh Circuit's holding in Scott.[6]

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[6] In reaching its conclusion that the judicial construction of the statute in question in Burnom was not a "clear break" in the law, the Seventh Circuit was influenced by the fact that the construction did not overrule any judicial precedent. Burnom, 27 F.3d at 284. In this case, the Illinois Supreme Court clearly purports to overrule a long-standing, undisturbed decision of the Seventh Circuit, further underlining the unforeseeability of

Third, the decision "must disadvantage the offender affected by it." Weaver. 450 U.S. at 30-31. It is on this leg of the ex post facto analysis that the Illinois Supreme Court parts company with the decisions of the federal courts of appeals.

Circuit courts have unvaryingly refused to permit the retrospective application of new or amended statutes or administrative rules which purported to alter preexisting rules to make parole more difficult. See e.g., Royster v. Fauver, 775 F.2d 527, 533-34 (3d Cir. 1985) (if standards under new parole law were more rigorous than standards that were in effect when prisoner committed offense, then to apply the new standards to the prisoner would be a violation of the Ex Post Facto Clause); Marshall v. Garrison, 659 F.2d 440, 444-46 (4th Cir. 1981) (Parole Commission forbidden to consider more stringent criteria that did not govern parole eligibility at the time that prisoner committed crime for which sentenced); Shepard v. Taylor, 556 F.2d 648, 653-54 (2d Cir. 1977) (the Ex Post Facto Clause prohibits the invocation of new and more onerous parole eligibility considerations that were forbidden when prisoner was originally sentenced).

The same conclusion is implicit in the decisions of the federal courts of appeals which hold that new restrictions on eligibility for parole do not violate the Ex Post Facto Clause where they are not more onerous than the restrictions that applied when the prisoner committed the offense. See e.g., Connor v. Estelle, 981 F.2d 1032 (9th Cir. 1992) (no violation

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the decision.

of the Ex Post Facto Clause where criteria for determining eligibility under the new statute were substantially the same as the criteria when prisoner committed his offense); Prater v. U.S. Parole Comm'n, 802 F.2d 948 (7th Cir. 1986)(en banc) (denial of parole on the basis of a "deprecate the seriousness of the offense" factor first set out in the parole statute enacted after prisoner committed offense did not violate the Ex Post Facto Clause because the same factor was implicit in the old statute).

Mr. Hanrahan suffered a far more serious deprivation than the application of more onerous parole criteria that the courts in the above cases held to run afoul of the Ex Post Facto Clause. The natural consequence of the Illinois Supreme Court's decision that state law does not create a liberty interest in parole is that the PRB is no longer under an obligation to release prisoners that satisfy the statutorily mandated criteria. The PRB can now deny parole for any reason or for no reason at all. Accordingly, the decision of the Illinois Supreme Court does not simply apply more onerous criteria to parole determinations but eliminates the necessity to consider these criteria altogether.

This Court has not addressed the question whether a retroactive deprivation of a liberty interest in parole violates the Ex Post Facto Clause. The Court has twice expressly declined to consider whether retrospective application of the federal parole guidelines violates the Ex Post Facto Clause. See United States Parole Commission v. Geraghty, 445 U.S. 388, 390 n.1, 408 (1980); United States v. Addonizio, 442 U.S. 178, 184 (1979). In each of these cases, the Court found it unnecessary to address any part of the ex post facto issue.

Recently, in California Dep't of Corrections v. Morales, 514 U.S. ___, 116 S. Ct. 1597 (1995), the Court clarified the degree of "disadvantage" necessary to show an ex post facto violation. An offender must show that the retroactive harm was more than some ambiguous "disadvantage" or the mere denial of an uncertain "opportunity" to take advantage of early release provisions. Morales, 115 S. Ct. at 1602 n.3. Instead, a statutory change violates the ex post facto prohibition if it "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Id. Morales also made clear that the application of the Ex Post Facto Clause is a matter of degree and that small "mechanical" changes producing only a "speculative" or "attenuated" risk of increasing a prisoner's term of confinement do not fall within the constitutional prohibition. Id. at 1602-03.

Last week, in Lynce v. Mathis, No. 95-7452, 1997 LW 65582 (Feb. 19, 1997), the Court reiterated the principles it enunciated in Morales. In Lynce, the court invalidated a state statute which had retroactively canceled petitioner's provisional early release credits. The Court reasoned that cancellation of the credits violated the Ex Post Facto Clause because it made the petitioner's punishment more onerous than under the law in effect at the time he committed his offense.

Neither Lynce nor Morales answers the question presented in this case. The Court was not asked to consider whether the retroactive application of more onerous criteria for granting parole that those in effect when a prisoner committed

the offense, runs afoul of the Ex Post Facto Clause.[7] More fundamentally, this case presents this Court with the yet undecided question whether, and in what circumstances, a judicial decision (and by extension, a legislative act), may extinguish a constitutional right which a prisoner enjoyed at the time of his or her offense. Lynce did not involve the retroactive deprivation of a constitutional right; the legislation in question retroactively invalidated a statutory right to early release credits. The legislation in Morales extinguished a statutory right to annual parole consideration. Likewise, the other cases that this Court has decided under ex post facto principles all involved the retroactive removal of a statutory right. See e.g., Lindsey v. Washington, 301 U.S. 397 (1937) (invalidating statute that changed discretionary sentence ceiling to mandatory sentence for crime committed between commission of crime and sentencing); Weaver v. Graham, 450

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[7] It is clear that an inmate is more likely to be paroled when the Parole Board is required to justify its decision on the grounds of statutorily mandated substantive criteria than when Board can deny parole release arbitrarily for any reason or for no reason at all. See Greenholtz, 442 U.S. at 9-11 (arbitrary denial is permitted if no liberty interest in parole). If the availability of Due Process protection did not have practical significance on sentence length, presumably this Court, in the interests of judicial economy, would have put swift paid to the many cases that the state and federal courts have entertained on the issue of whether a state statute creates liberty interests in parole. The Court would long ago have made clear that application of due process safeguards to parole eligibility decisions does not have any practical effect on sentence length and therefore litigation concerning its applicability holds no more than academic interest. Instead, the Court has emphasized that the important function of due process in the parole decisionmaking process is to increase the accuracy of the administrative factfinding process and "to minimize the risk of error." Greenholtz, 442 U.S. at 13.

U.S. 24 (1981) (invalidating statute that retroactively reduced amount of "gain time" credits available to prisoners at the time of sentencing); Miller v. Florida, 482 U.S. 423 (1987) (invalidating guidelines that increased the presumptive sentencing range between commission of crime and sentencing).

In this case, by contrast, the Illinois Supreme Court purports to invalidate a protected constitutional right - the right to due process in parole eligibility determination - that Mr. Hanrahan enjoyed at the time of his offenses. This Court should resolve whether the retrospective deprivation of a constitutional right, as opposed to the deprivation of a statutory right, can ever be permissible under ex post facto principles.

IV. THE DECISION OF THE ILLINOIS SUPREME COURT CONFLICTS WITH THIS COURT'S DECISION IN PERRY V. SINDERMANN, 408 U.S. 593 (1972)

In Perry v. Sindermann, 408 U.S. 593 (1972), this Court held that a property interest may arise from "such rules or mutually explicit understandings that support an individual's claim of entitlement to the benefit and that he may invoke at a hearing." Id. at 601. Explicit "rules" or "understandings" giving rise to a protectible Due Process interest are present in this case because the established and undisturbed practice of the PRB since the time that Mr. Hanrahan was incarcerated has been to deny parole only when a prisoner fails to satisfy the statutorily mandated criteria.

Throughout the period of his incarceration, Mr. Hanrahan has enjoyed a liberty interest in parole. Case law in both Illinois state and federal courts as well as administrative practice all point to the settled expectation of Mr. Hanrahan and other prisoners that the Board will decide their eligibility for parole in accordance with statutorily mandated substantive criteria set out in the Illinois parole statute and the applicable regulations.

In the fifteen years since Scott was decided, numerous Illinois state appellate courts and lower federal courts have applied Due Process principles to the decisions made by the Illinois Prisoner Review Board. See, e.g., Mosley v. Klincar, 947 F.2d 1338 (7th Cir. 1991); Jackson v. Illinois Prisoner Review Board, 856 F.2d 890 (7th Cir. 1988); Walker v. Illinois Prisoner Review Board, 694 F.2d 499 (7th Cir. 1982); Walker v. Klincar, 245 Ill. App. 3d 381, 613 N.E.2d 295 (3d Dist.), appeal denied, 152 Ill. 2d 581, 622 N.E.2d 1229 (1993); Pardo v. Chrans, 174 Ill. App. 3d 549, 528 N.E.2d 1071 (4th Dist. 1988), appeal denied, 124 Ill. 2d 556, 535 N.E.2d 916 (1989); Outlaw v. O'Leary. 161 Ill. App. 3d 218, 514 N.E.2d 208 (3d Dist. 1987), appeal denied, 118 Ill. 2d 546, 520 N.E.2d 387 (1988). Beyond the reported cases, there are literally scores of cases in which the various Illinois Circuit Courts and federal District Courts have held that Due Process requirements apply to the Illinois parole decision.

On the one occasion where the Illinois Supreme Court had the opportunity to revisit the holding in Scott, it instead proceeded on the assumption that Scott was correctly decided. Tiller v. Klincar, 138 Ill.2d 1, 14, 561 N.E.2d 576, 581-82 (1990).

Petitioner is unaware of a single instance in the years since Mr. Hanrahan committed his offense where the Illinois Prisoner Review Board denied parole on a ground other than a failure of a prisoner to satisfy the statutorily mandated substantive criteria. Although in many cases prisoners have claimed that the Board misapplied the substantive criteria, no reported decision exists challenging a parole denial on the ground that the Board failed to apply the criteria altogether. The absence of such reported challenges strongly suggests that the Board has in every instance applied Due Process principles to its decisional practices and procedures. On at least one occasion, the Board expressly conceded that Scott was correctly decided. See Newbury v. Prisoner Review Board, 791 F.2d 81, 84 (7th Cir. 1986).

The Illinois Supreme Court decision attempts to reverse settled practice that the Illinois courts, the federal courts, the Illinois legislature and the Board itself have followed since the parole statute was enacted. In so doing, the decision of the Illinois Supreme Court directly conflicts with this Court's decision in Perry because the consistent pattern or practice of the PRB created a protectible due process interest in the Board's continued adherence to the practice.

In Jago v. Van Curen, 454 U.S. 14 (1981), this Court held that the implied contract principles underlying the doctrine of "mutually explicit understandings" in Perry do not "readily lend themselves to determining the existence of constitutionally protected liberty interests in the setting of prisoner parole." Jago, 454 U.S. at 18. It would appear, however, that the Court's differentiation of property rights and prisoner's liberty interests in Jago was motivated by the

concern that to permit liberty interests to arise from an alleged pattern or practice or from mutually explicit understandings, would curtail the discretion of prison officials. Id. at 18-20. This concern is not implicated here. The Board has consistently and willingly applied due process considerations to its parole decisionmaking practices. Accordingly, it would not be contrary to the policy reasons that motivated the Court's concern in Jago to hold that the Board's established practice gives rise to a protectible Due Process interest.

CONCLUSION

This Court should grant the writ of certiorari to resolve the conflict between the Seventh Circuit Court of Appeals and the Illinois Supreme Court. The Court should decide which of the two decisions is faithful to its holding in Greenholtz, as the Court may choose to modify that decision in light of Sandin v. Connor.

This Court should also make clear that decisions of the federal courts of appeal prevail over contrary decisions of the State courts on the issue of whether a State parole statute creates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

In the alternative, this Court should resolve the conflict between the Illinois Supreme Court and federal courts of appeals on the question of whether the application of more onerous conditions for parole that those in existence at the time Mr. Hanrahan committed his offenses violates principles underlying the Ex Post Facto Clause. The Court should hold that the decision of the Illinois Supreme Court has only

prospective effect in the sense that it does not apply to Mr. Hanrahan or to other Illinois prisoners who enjoyed a liberty interest in parole at the time that they committed the offenses for which they are incarcerated.

At a minimum, this Court should remand the case to the Illinois Supreme Court in order to provide Mr. Hanrahan with the opportunity he has been denied to argue that he has a liberty interest in parole protected by the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

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No. 78357 - Homer E. Hanrahan, appellee, v. James K. Williams et al., appellants. Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The Mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 12, 1996.

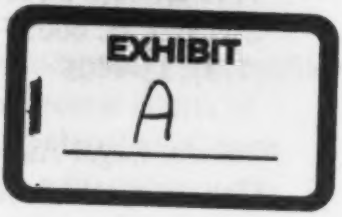

EXHIBIT
B

Docket No. 78357–Agenda 15–January 1996.
HOMER E. HANRAHAN, Appellee, v. JAMES K. WILLIAMS *et al.*, Appellants.

JUSTICE MILLER delivered the opinion of the court:

Plaintiff, Homer E. Hanrahan, filed a second-amended complaint in the circuit court of Lee County against defendants, the Illinois Prisoner Review Board and its individual members (collectively, the Board), challenging the denial of his parole. In count III, Hanrahan sought the issuance of a common law writ of *certiorari* to obtain review of the Board's June 1993 decision to deny him parole. The circuit court dismissed count III as "insufficient in law," and found no just reason for delaying appeal of the order (155 Ill. 2d R. 304(a)). The appellate court reversed the dismissal. 267 Ill. App. 3d 735. We granted the Board's petition for leave to appeal (155 Ill. 2d R. 315), and allowed *amici curiae* to join in filing a brief (155 Ill. 2d R. 345).

BACKGROUND

In 1976, a jury found Hanrahan guilty of murder, aggravated kidnapping, aggravated battery, and conspiracy. He was sentenced to serve concurrent indeterminate prison terms of 50 to 100 years for murder, 20 to 40 years for aggravated kidnapping, and 3 to 10 years for aggravated battery. His convictions and sentences were affirmed on direct review. *People v. Hanrahan*, 64 Ill. App. 3d 207 (1978). Hanrahan is currently incarcerated at the Dixon Correctional Center, having served approximately 20 years of his sentences. He has been eligible for parole since 1983.

In June 1993, the Board conducted parole hearings, and ultimately denied Hanrahan parole. Thereafter, Hanrahan filed a second amended complaint consisting of three counts. In count III, Hanrahan requested that the circuit court issue a common law writ of *certiorari* to review the Board's June 1993 decision to deny him parole. Hanrahan alleged in part that the decision to deny him parole was "arbitrary and capricious, an abuse of

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discretion, contrary to law and against the manifest weight of the evidence." In his prayer for relief, Hanrahan requested that the circuit court reverse the Board's decision.

After granting Hanrahan leave to file his second-amended complaint, the circuit court granted the Board's oral motion to dismiss count III of the complaint. The circuit court ruled that count III was "insufficient in law," and found no just reason for delaying appeal of the order. 155 Ill. 2d R. 304(a). Hanrahan appealed the dismissal.

The appellate court reversed. 267 Ill. App. 3d 735. The appellate court first stated that the Administrative Review Law is not applicable to review of the Board's parole-release decisions. The appellate court next noted that a writ of *mandamus* would not afford Hanrahan the type of relief he sought. The appellate court further found unpersuasive the Board's argument that, because of its discretionary nature and the minimal record resulting from the action, the parole-release decision is not reviewable by issuance of a common law writ of *certiorari*. To illustrate the feasibility of judicial review of parole-release decisions, the appellate court pointed to federal *habeas corpus* proceedings in which federal courts have reviewed the merits of parole-release decisions. See *Zannino v. Arnold*, 531 F.2d 687 (3d Cir. 1976) (federal prisoner challenged federal parole board's decision to deny parole and sought relief under 28 U.S.C. §2241); *United States ex rel. O'Connor v. MacDonald*, 449 F. Supp. 291 (N.D. Ill. 1978) (state prisoner challenged Illinois parole board's decision to deny parole and sought relief under 28 U.S.C. §2254). Noting that the extent of review conducted by a federal court in *habeas corpus* proceedings is similar to that under a common law writ of *certiorari*, the appellate court found that common law writs of *certiorari* may issue to review parole-release decisions in Illinois.

We granted the Board's petition for leave to appeal (155 Ill. 2d R. 315), and have allowed the American Civil Liberties Union of Illinois, Chicago Conference of Black Lawyers, Illinois Attorneys for Criminal Justice, Illinois Public Defender Association, National Association of Criminal Defense Lawyers, Northwestern University Legal Clinic, and the office of the State

Appellate Defender to file a brief, collectively, as friends of the court (155 Ill. 2d R. 345).

DISCUSSION

Illinois inmates who are denied parole may seek several remedies, including a writ of *mandamus* in state court and a writ of *habeas corpus* in federal court. In the parole context, a writ of *mandamus* may be used to compel the Board to exercise its discretion, but may not be used to compel the Board to exercise its discretion in a certain manner. See, *e.g.*, *People ex rel. Abner v. Kinney*, 30 Ill. 2d 201 (1964) (*mandamus* used to compel Board to provide parole-eligible inmate with a parole hearing). In addition, federal courts will grant a writ of *habeas corpus* if a petitioner demonstrates that his custody is in violation of the Constitution or laws of the United States. *Lilly v. Gilmore*, 988 F.2d 783, 789 (7th Cir. 1993); *Escobar v. O'Leary*, 943 F.2d 711, 720 (7th Cir. 1991); see also *United States ex rel. Arnold v. Illinois Prisoner Review Board*, 803 F. Supp. 222 (N.D. Ill. 1992) (Illinois inmate petitioned for writ of *habeas corpus* pursuant to 28 U.S.C. §2254 because of claimed equal protection violation). Hanrahan did not request either *mandamus* or *habeas corpus* relief in count III of his second-amended complaint. Instead, Hanrahan sought the issuance of a common law writ of *certiorari*.

A common law writ of *certiorari* is a general method for obtaining circuit court review of administrative actions when the act conferring power on the agency does not expressly adopt the Administrative Review Law and provides for no other form of review. *Smith v. Department of Public Aid*, 67 Ill. 2d 529, 541 (1977). The standards of review under a common law writ of *certiorari* are essentially the same as those under the Administrative Review Law. *Smith*, 67 Ill. 2d at 541-42. Under the Administrative Review Law, courts generally do not interfere with an agency's discretionary authority unless the exercise of that discretion is arbitrary and capricious (*Dorfman v. Gerber*, 29 Ill. 2d 191, 196 (1963)) or the agency action is against the manifest weight of the evidence (*Murdy v. Edgar*, 103 Ill. 2d 384, 391 (1984)). In the instant case, the parole-

release statutory scheme fails to adopt the Administrative Review Law or provide for another form of review. Hanrahan thus contends that circuit courts may issue common law writs of *certiorari* to review the merits of the Board's parole-release decisions.

Whether, and to what extent, action by an administrative agency is reviewable is a question of statutory interpretation. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 497 (1988) (whether IHDA action is reviewable is a question of statutory interpretation). In this case, we must determine whether the legislature intended for the merits of the Board's parole-release decision to be reviewable by courts, an issue of first impression in Illinois.

While most agency actions are presumed reviewable, no presumption arises if there is a statutory bar to review or if statutory language commits the agency decision to unreviewable agency discretion. *Greer*, 122 Ill. 2d at 497. Factors to consider in determining whether statutory language precludes judicial review include the statute's "express language, the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Greer*, 122 Ill. 2d at 497-98. "Of particular importance is whether the statute contains standards, goals, or criteria by which a court may evaluate agency action." *Greer*, 122 Ill. 2d at 498, citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 28 L. Ed. 2d 136, 150, 91 S. Ct. 814, 820 (1971). Accordingly, judicial review is precluded if "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830, 84 L. Ed. 2d 714, 723, 105 S. Ct. 1649, 1655 (1985).

The Illinois Prisoner Review Board is an administrative agency created by the legislature. See *People ex rel. Abner v. Kinney*, 30 Ill. 2d 201, 205 (1964) (Parole and Pardon Board "sits as an administrative body with the power to make final decisions in parole matters"). The members of the Board are appointed by the Governor with the advice and consent of the Senate. 730 ILCS 5/3–3–1(b) (West 1992). To be eligible for appointment, a person must have five years' experience in the

field of penology, corrections work, law enforcement, sociology, law, education, social work, medicine, psychology, other behavioral sciences, or a combination of these fields. 730 ILCS 5/3–3–1(b) (West 1992).

One of the Board's duties is to determine whether an eligible inmate should be granted or denied parole. 730 ILCS 5/3–3–2(a)(1), (a)(2) (West 1992); see also 730 ILCS 5/3–3–1(a)(1) (West 1992) (Board is "paroling authority" for persons sentenced under law in effect prior to effective date of the determinate sentencing act of 1977). "Parole" is defined as "the conditional and revocable release of a committed person under the supervision of a parole officer." 730 ILCS 5/3–1–2(k) (West 1992). In making parole-release decisions, the Board must consider certain material and reports, including statements from the inmate, the State's Attorney and the victim. 730 ILCS 5/3–3–4(d) (West 1992). The Board must render the parole-release decision within a reasonable time after hearing and must state the basis for its decision. 730 ILCS 5/3–3–5(f) (West 1992).

The legislature has also authorized the Board to promulgate its own rules regarding the conduct of its work and the exercise of its discretion. 730 ILCS 5/3–3–2(d), 3–3–5(h) (West 1992). The rules adopted by the Board (20 Ill. Adm. Code §§1610.10 through 1610.180 (1992-93)) provide that "[t]he Board grants parole as an exercise of grace and executive discretion as limited or defined by the Illinois General Assembly in duly adopted legislation" and that "[t]he parole release decision is a subjective determination based on available relevant information." 20 Ill. Adm. Code §§1610.50(a), (b) (1992-93). The rules provide lists of factors that may be considered by the Board in determining whether to grant or deny parole. 20 Ill. Adm. Code §1610.50(b) (1992-93) (listing factors relevant to inmate's prior history, committing offense, institutional adjustment, and release plans). The rules, however, specifically state that the parole-release decision is not limited to the consideration of only those factors listed. 20 Ill. Adm. Code §1610.50(b) (1992-93).

The legislature has set forth criteria under which the Board must deny parole in section 3–3–5(c) of the Unified Code of

Corrections, which reads:

> "The Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline." 730 ILCS 5/3–3–5(c) (West 1992).

The rules set forth the same criteria for determining when the Board must deny parole. 20 Ill. Adm. Code §1610.50(a) (1992-93). We note that the council commentary of section 3–3–5(c) states that "[t]he Board should state one or more of the reasons listed in [section 3–3–5(c)] as the basis for its decision denying parole ***. Additional reasons may also be stated." 730 ILCS Ann. 5/3–3–5, Council Commentary, at 56 (Smith-Hurd 1992).

Hanrahan contends that the Board's discretion is guided by statutory criteria, and that the rules set forth well-defined limits to the Board's discretion. Hanrahan concludes that, because the parole-release statutory scheme "contains standards, goals, or criteria by which a court may evaluate agency action" (*Greer*, 122 Ill. 2d at 498), judicial review by the issuance of a common law writ of *certiorari* should be available.

We disagree. The statutory provisions provide criteria under which the Board must deny parole. The statutory provisions do not, however, state when the Board must grant parole. *Heirens v. Mizell*, 729 F.2d 449, 465 (7th Cir. 1984) (neither statutory scheme nor rules provide for circumstances under which the Board would be required to grant parole). The Board is free to consider any available relevant information to make its determination to grant or deny parole. 20 Ill. Adm. Code §1610.50(b) (1992-93). Further, the rules expressly provide that parole is granted "as an exercise of grace and executive discretion" (20 Ill. Adm. Code §1610.50(a) (1992-93)), and Illinois courts have consistently held that parole is not a right (*People v. Hawkins*, 54 Ill. 2d 247, 252 (1973); *People ex rel.*

Jones v. Brantley, 45 Ill. 2d 335, 337-38 (1970); *People ex rel. Castle v. Spivey*, 10 Ill. 2d 586, 594-95 (1957); *People ex rel. Richardson v. Ragen*, 400 Ill. 191, 201 (1948); *People v. Nowak*, 387 Ill. 11, 14 (1944)).

We believe that Illinois' statutory criteria and the Board's rules do not provide standards for release on parole sufficiently objective to allow a court to evaluate the Board's decision to deny parole. We thus conclude that the legislature, in drafting the statutory language, intended the Board to have complete discretion in determining whether to grant parole when the denial of parole is not mandated by statute.

We recognize that our interpretation of section 3–3–5(c) of the Unified Code of Corrections differs from the United States Court of Appeals for the Seventh Circuit's interpretation of the same statutory language in *United States ex rel. Scott v. Illinois Parole & Pardon Board*, 669 F.2d 1185 (7th Cir. 1982). While the issue presented in *Scott* differed from the issue presented here, the *Scott* court, in its analysis, concluded that section 3–3–5(c) of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, par. 1003–3–5(c) (Board "shall not" grant parole "if" one of three statutory criteria are found)) requires "the Board to release an inmate who is eligible for parole unless one of the specified reasons for denial are found to exist." *Scott*, 669 F.2d at 1189. As to its interpretation, however, the *Scott* court further observed:

> "[B]y stating its rule in the negative Illinois has left open the possibility that its statute can also be reasonably read as not creating an expectancy of release on parole. It can be read as merely a statement by the Illinois legislature as to when the Board must deny parole, leaving the Board free in the absence of those conditions to exercise its own discretion in deciding whether or not parole should be granted. Under this construction, the statute would not create a legitimate expectation of release and due process considerations would not apply." *Scott*, 669 F.2d at 1189.

Our construction of section 3–3–5(c) is consistent with this latter construction mentioned but rejected by the Seventh Circuit in *Scott*. This court is not bound by the Seventh Circuit's

interpretation of our statutes. *People v. Kokoraleis*, 132 Ill. 2d 235, 293-94 (1989) ("decisions of lower Federal courts are not conclusive on State courts, except insofar as the decision of the lower Federal court may become the law of the case"); see also *Averhart v. Tutsie*, 618 F.2d 479 (7th Cir. 1980) (where Indiana Supreme Court expressly held that state's parole-release statute created no expectancy of release, the federal court was bound by that interpretation).

Our finding is supported by the general nature of parole-release decisions, which are often based on subjective factors and predictions rather than objective factors. In *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979), the Supreme Court characterized the nature of parole-release determinations as follows:

> "The parole-release decision *** depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual. The parole determination, like a prisoner-transfer decision, may be made
>
> 'for a variety of reasons and often involve[s] no more than informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate.' " *Greenholtz*, 442 U.S. at 9-10, 60 L. Ed. 2d at 677, 99 S. Ct. at 2105, quoting *Meachum v. Fano*, 427 U.S. 215, 225, 49 L. Ed. 2d 451, 459, 96 S. Ct. 2532, 2538 (1976).

The *Greenholtz* court also stated:

> "In parole releases, *** few certainties exist. In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both

> for the individual inmate and for the community. ••• The entire inquiry is, in a sense, an 'equity' type judgment that cannot always be articulated in traditional findings." *Greenholtz*, 442 U.S. at 8, 60 L. Ed. 2d at 676, 99 S. Ct. at 2104.

We believe that the discussion in *Greenholtz* concerning the general nature of parole is instructive.

Hanrahan argues that the parole-release decision is no different from other administrative agency decisions, reviewable upon the issuance of a common law writ of *certiorari*, where the agency exercised wide discretion subject to legislative limits. See, *e.g.*, *Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413 (1990) (school board's decision to expel student for misconduct); *Smith v. Department of Public Aid*, 67 Ill. 2d 529 (1977) (Illinois Department of Public Aid's decision as to entitlement of benefits under food stamp program); *Nowicki v. Evanston Fair Housing Review Board*, 62 Ill. 2d 11 (1975) (Fair Housing Review Board's decision to impose fine after finding violation of ordinance). We believe, however, that the highly subjective and predictive nature of the parole-release decision, along with the fact that there are no standards sufficiently objective to allow a court to evaluate the Board's decision to deny parole other than the statutory criteria mandating denial, sets the parole-release decision apart from other cases.

We further believe that the Board's parole-release decisions more closely resemble those decisions found to be unreviewable in the federal courts pursuant to the Administrative Procedure Act (5 U.S.C. §701(a)(2) (1994) (precludes judicial review of agency action when "action is committed to agency discretion by law")). See *Lincoln v. Vigil*, 508 U.S. 182, 124 L. Ed. 2d 101, 113 S. Ct. 2024 (1993) (Indian Health Service's decision to discontinue clinical program for Indian children was committed to agency discretion by law and thus not subject to judicial review under APA); *Webster v. Doe*, 486 U.S. 592, 100 L. Ed. 2d 632, 108 S. Ct. 2047 (1988) (CIA Director's decision to discharge employee for national security reasons was committed to agency discretion by law and thus not subject to judicial review under APA); *Heckler v. Chaney*, 470 U.S. 821, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985) (Food and Drug

Administration's decision not to take enforcement action was committed to agency discretion by law and thus not subject to judicial review under APA); *Singh v. Moyer*, 867 F.2d 1035 (7th Cir. 1989) (United States Information Agency's recommendation to deny waiver of two-year foreign residency requirement was committed to agency discretion by law and thus not subject to judicial review under APA).

Hanrahan recognizes the predictive nature of the parole-release decision but contends that it does not shield the merits of the decision from judicial review. Hanrahan compares the predictive nature of the parole-release decision to the predictive nature of the Illinois Secretary of State's decision to restore driving privileges to persons whose licenses have been revoked. Hanrahan points out that the Secretary of State's actions are reviewable in the circuit court. *Murdy v. Edgar*, 103 Ill. 2d 384 (1984). As the Board observes, however, unlike the parole-release statutory scheme, the Illinois Vehicle Code expressly provides for review of the Secretary of State actions under the Administrative Review Law. 625 ILCS 5/6–212 (West 1994).

Hanrahan next points out that some states provide for judicial review of the merits of parole-release decisions. See *State v. Goulette*, 65 Wis. 2d 207, 222 N.W.2d 622 (1974) (Wisconsin affords judicial review of parole-release decisions by issuance of a common law writ of *certiorari*); *Wayne County Prosecutor v. Parole Board*, 210 Mich. App. 148, 532 N.W.2d 899 (1995) (Michigan statute provides for judicial review of parole-release decisions). Other states, however, have found that the merits of parole-release decisions are not subject to judicial review. See *Carrion v. New York State Board of Parole*, 620 N.Y.S.2d 420, 210 A.D.2d 403 (1994); *In re Question Concerning State Judicial Review of Parole Denial*, 199 Colo. 463, 610 P.2d 1340 (1980). It is apparent that each state must decide, based on its own statutory scheme, whether the merits of parole-release decisions are reviewable.

Finally, *amici curiae* contend that certain constitutional rights of inmates subject to parole have been violated. Neither party, however, has raised these issues. We therefore do not address them. See *People v. P.H.*, 145 Ill. 2d 209, 234 (1991).

CONCLUSION

For the reasons set forth above, we find that a common law writ of *certiorari* may not be issued to review the merits of the Board's decision to deny Hanrahan's parole. Because no set of facts could be proved which would entitle Hanrahan to a common law writ of *certiorari*, count III of his second-amended complaint was properly dismissed.

The judgment of the appellate court is reversed, the judgment of the circuit court of Lee County is affirmed, and the cause is remanded for further proceedings.

Appellate court judgment reversed;
circuit court judgment affirmed;
cause remanded.

NO. 78357
IN THE
SUPREME COURT OF ILLINOIS

HOMER E. HANRAHAN,

Plaintiff-Appellee,

v.

JAMES K. WILLIAMS, JOSEPH T. DAKIN, JOANNE S. SHEA, JOSEPH J. LONGO, RAFAEL NIEVES, WILLIAM HARRIS, BARBARA HUBBARD, TOMMY WELLS, HERBERT D. BROWN, CORRINE FRANKLIN, ANNE E. TAYLOR, WILLIAM REDMOND, and the ILLINOIS PRISONER REVIEW BOARD,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois
Second Judicial District No. 2-93-1023

PLAINTIFF-APPELLEE HOMER E. HANRAHAN'S PETITION FOR REHEARING

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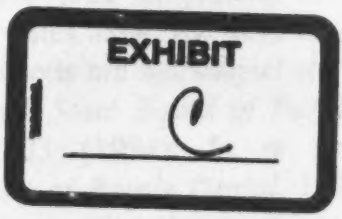

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NO. 78357

IN THE
SUPREME COURT OF ILLINOIS

HOMER E. HANRAHAN,

Plaintiff-Appellee,

v.

JAMES K. WILLIAMS, JOSEPH T. DAKIN, JOANNE S. SHEA, JOSEPH J. LONGO, RAFAEL NIEVES, WILLIAM HARRIS, BARBARA HUBBARD, TOMMY WELLS, HERBERT D. BROWN, CORRINE FRANKLIN, ANNE E. TAYLOR, WILLIAM REDMOND, and the ILLINOIS PRISONER REVIEW BOARD,

Defendants-Appellants.

PLAINTIFF-APPELLEE HOMER HANRAHAN'S PETITION FOR REHEARING

Appellee Homer E. Hanrahan ("Mr. Hanrahan") respectfully petitions pursuant to Illinois Supreme Court Rule

367 for rehearing in this matter.

INTRODUCTION

This Court's opinion was issued on September 19, 1996. The opinion of this Court is inconsistent and irreconcilable with the 1982 decision of the United States Court of Appeals for the Seventh Circuit holding that the protections of the Due Process Clause of the United States Constitution protect Illinois inmates seeking parole under 730 ILCS 5/3-3-5(c) (the "Illinois Parole Statute"). United States ex rel. Scott v. Illinois Parole and Pardon Board, 669 F.2d 1185 (7th Cir.) cert. denied, 459 U.S. 1048 (1982). The opinion upsets nearly a decade and a half of settled precedent in the Illinois and federal courts that the Illinois Prisoner Review Board is constrained by Due Process when it passes upon the cases of inmates seeking parole pursuant to 730 ILCS 5/3-3-5(c).

Rehearing should be granted for four reasons. First, this Court announced its divergence with the Seventh Circuit's longstanding precedent (see Hanrahan v. Williams, No. 78357, Slip Op. at 7 (September 19, 1996)) without the benefit of briefing or argument by the parties. It is fundamentally unfair for this Court to decide such an important issue without providing the parties the opportunity even to address the question. Second, this Court's opinion cannot be reconciled with Due Process and constitutes an impermissible retraction of a settled liberty interest that has long existed in this State. Third, the opinion is inherently legislative in character and violates the *ex post facto* clause. Fourth, the opinion unnecessarily generates an unseemly conflict between the Illinois and federal courts.

ARGUMENT

I. THIS COURT'S OPINION ANNOUNCES A FEDERAL DUE PROCESS RULING WITHOUT BENEFIT OF ARGUMENT BY THE PARTIES.

This Court's departure from the Seventh Circuit's decision in Scott, and under which Illinois inmates would have no Due Process protections at their parole hearings, came without the benefit of argument or briefing by the parties. For reasons set forth in Sections II and III of this Petition, Mr. Hanrahan respectfully submits that this Court's decision presents serious federal constitutional issues. Whatever the merits of those issues, they are matters that should be briefed and argued to this Court before deciding so important a question as the existence of Due Process protections for Illinois inmates seeking parole.

Mr. Hanrahan's counsel could not have predicted that this Court would in this case issue a ruling removing parole

from the realm of Due Process. In the fourteen and one half years since Scott, numerous decisions of the Illinois Appellate Court and of the federal courts have applied Due Process principles to the decisional practices and procedures of the Illinois paroling agency. See, e.g., Walker v. Klincar, 245 Ill. App. 3d 381, 613 N.E.2d 295 (3d Dist.), appeal denied, 152 Ill. 2d 581, 622 N.E. 2d 1229 (1993); Pardo v. Chrans, 174 Ill. App. 3d 549, 528 N.E.2d 1071 (4th Dist. 1988), appeal denied, 124 Ill. 2d 556, 535 N.E.2d 916 (1989); Outlaw v. O'Leary, 161 Ill. App. 3d 218, 514 N.E.2d 208 (3d Dist.1987), appeal denied, 520 N.E.2d 387 (1988); Mosley v. Klincar, 947 F.2d 1338 (7th Cir. 1991); Walker v. Illinois Prisoner Review Board, 694 F.2d 499 (7th Cir. 1982); Jackson v. Illinois Prisoner Review Board, 856 F.2d 890 (7th Cir. 1988). Beyond the reported appellate decisions, there are literally scores of cases in which various Illinois Circuit

Courts and the federal District Courts have held that Due Process requirements apply to the Illinois parole decision.

In all the years since Scott, this Court, although squarely confronted with the opportunity on one occasion,[1] has not once addressed whether the Illinois Parole Statute confers a protectible liberty interest in parole. In Tiller v. Klincar, 138 Ill. 2d 1, 14-15, 561 N.E.2d 576, 581, cert. denied, 496 U.S. 938 (1990), this Court explicitly declined to revisit the issue that Scott had decided then eight years previously.

Nor has the Illinois General Assembly, in all the years since Scott, once amended the Illinois Parole Statute to

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1 Decisions of the Illinois Appellate Court have afforded many other opportunities to address this issue. See, e.g., Sterling v. Klincar, 226 Ill. App. 3d 675, 589 N.E.2d 1149 (3d Dist. 1992); Goins v. Klincar, 225 Ill. App. 3d 961, 588 N.E.2d 420 (3d Dist. 1992), appeal denied, 145 Ill. 2d 633, 596 N.E.2d 628 (1992); Blythe v. Lane, 194 Ill. App. 3d 451, 551 N.E.2d 680 (5th Dist. 1990). This Court has never availed itself of the opportunity to address this issue before or after Tiller.

eliminate the protectible liberty interest that Scott found to exist in that statute.

Given this long history, Mr. Hanrahan's counsel were entitled to rely upon Scott as settled doctrine. If counsel had known that this Court's decision would undermine nearly a decade and a half of established law and practice, counsel would have thoroughly briefed and argued the issues set forth in this Petition. We respectfully urge this Court to permit argument and briefing of whether this Court can and should at this time reinterpret the Illinois Parole Statute in a manner inconsistent with Scott.

II. THIS COURT'S OPINION IS INCONSISTENT WITH FEDERAL DUE PROCESS.

On the merits, this Court's decision is inconsistent with federal due process because it would undermine and unsettle decades of practice under which Illinois inmates seeking parole have, consistent with Scott, expected due process protections

in connection with their parole applications.

In the 1982 decision in Scott the Seventh Circuit undertook a careful analysis of the Illinois Parole Statute to determine whether persons applying for parole in Illinois are entitled to Due Process. The Seventh Circuit had the benefit of the United States Supreme Court's decision in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), and, using Greenholtz as a starting point, parsed the Illinois Parole Statute and examined the practice of the (then) Illinois Board of Pardons and Paroles as reflected in its rules and regulations and the commentary to the Illinois Parole Statute to conclude that the positive law of Illinois confers a protectible liberty interest upon applicants for parole.

Scott recognized that the Illinois Parole Statute differs in certain respects and parallels in others the Nebraska statute considered in Greenholtz -- terming the Illinois statute

"practically a mirror image of the Nebraska statute." 669 F.2d at 1188. Scott noted that the Illinois Parole Statute was capable of alternative readings, under one of which the statute clearly conferred a protectible liberty interest. 669 F.2d 1188-89. To resolve the question, Scott looked to the actual practice of the Illinois Board in exercising its paroling discretion. Under that practice, as reflected in the Board's rules, parole was only denied in those instances where an applicant failed to satisfy one of the enumerated statutory factors; where all three factors were absent, parole was granted. 669 F.2d at 1189-90.

Since the Scott decision, the Illinois Board of Pardons and Paroles and its successor, the Illinois Prisoner Review Board, have continued the practice in thousands of parole cases of denying parole only upon a finding of one of the statutory factors. The parole denial in Mr. Hanrahan's case

(Ex. 9 in the Appendix of Exhibits to Plaintiff's Second Amended Complaint), which denies parole based on the seriousness of the offense (730 ILCS 5/3-3-5(c)(2)), is but one example of the universal practice both before and after Scott.

As set forth in Section I of this Petition (at pp. 3 - 4), there is a fourteen and one half year history of decisions by the Illinois Appellate Court and the federal courts applying Due Process in the Illinois parole context. This Court, moreover, despite having the opportunity, has never before diverged from Scott. And the Illinois General Assembly has not amended the Illinois Parole Statute since Scott in any way material to this issue.

It is well settled that "the existence of rules and understandings, promulgated and fostered by state officials" can give rise to a protectible Due Process interest. See Perry v. Sindermann, 408 U.S. 593, 602 (1972). Necessarily, since

settled practice and expectations can and do give rise to protectible Due Process interests, "the question whether state laws create a federally protected right never could depend exclusively on the construction of those laws by a state court." Ellard v. Alabama Board of Pardons and Paroles, 824 F.2d 937, 943 n. 7 (11th Cir. 1987).

This Court's opinion violates "rules and understandings" that have long existed in Illinois. After nearly a decade and a half of decisional law since Scott, established practice of the Illinois Prisoner Review Board both before and after Scott and legislative acquiescence in Scott's analysis, this Court has radically altered the face of parole in this State. This Court's decision, therefore, is fundamentally legislative in character. Under it, for the first time in the history of the parole statute, the Illinois Prisoner Review Board is free to deny parole for reasons of caprice or whim completely

unconnected to the statutory factors for parole.

This Court simply cannot be the final arbiter of whether there is a protectible Due Process interest in parole in Illinois. In another context, in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the United States Supreme Court reversed a decision of this Court precisely because this Court had misapprehended the Due Process entitlements that the plaintiff enjoyed under the Illinois Fair Employment Practices Act. Here, this Court's opinion reflects a misapprehension of the Due Process entitlements that have developed over the course of many years in the Illinois parole process.

Under these circumstances, where the protections of Due Process have long been held to exist, this Court may not, under the guise of proffering a new "interpretation" of the Illinois Parole Statute simply remove parole from the realm of Due Process.

III. THIS COURT'S RULING VIOLATES THE *EX POST FACTO* CLAUSE.

For many years, in thousands of parole cases, the formula for determining parole eligibility has been whether the parole applicant presents one of the three enumerated factors in the Illinois Parole Statute the existence of which requires denial of parolee. In the absence of all of the factors, parole has been granted in this State. At the time Mr. Hanrahan and the other so-called "C" prisoners were sentenced, this was the understanding of all participants in the process -- consistent with Scott and the Illinois Parole Statute parole would be available if no statutory factor were present. The affidavit of Judge Robert J. Collins (C. 453-54, App. 27-28, ¶ 31) demonstrates conclusively that in Mr. Hanrahan's case this was what the sentencing judge understood when Mr. Hanrahan was sentenced.

This Court's opinion retroactively alters the settled

interpretation of the Illinois Parole Statute by holding that parole may be denied even in the absence of any statutory factor. This decision changes the substantive nature of the parole decision from what prevailed at the time the "C" prisoners were sentenced. It is not open to this Court to do what the Illinois General Assembly clearly could not -- i.e., alter fundamentally and retroactively the nature of the permissible considerations in the parole decision and, thereby, the substantive formula for determining parole eligibility. See California Department of Corrections v. Morales, 115 S. Ct. 1597 (1995). Such an inherently legislative action is violative of the *ex post facto* clause.

IV. THIS COURT'S OPINION CREATES AN UNSEEMLY CONFLICT WITH THE FEDERAL COURTS.

As this Court's opinion acknowledged (Slip. Op. at 7), its interpretation of the Illinois Parole Statute "differ[s]" from

that of the Seventh Circuit in Scott. The result of this "difference" will be an unseemly and chaotic situation in which the federal courts recognize a Due Process liberty interest in Illinois parole while the Illinois courts do not. Such a conflict is both intolerable and unnecessary.

CONCLUSION

For the foregoing reasons, Appellee Homer E. Hanrahan respectfully requests that this Court enter an order pursuant to Illinois Supreme Court Rule

367 withdrawing its opinion, permitting supplemental briefing, and granting reargument in this case.

Respectfully submitted,

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